United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

ORIGINAL

75-4124
75-4125

B
Pls

United States Court of Appeals

For the Second Circuit

AARON KRAUT and IRIS KRAUT,
HARRY KRAUT and MARIAN KRAUT,

Petitioners-Appellants,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

APPELLANTS' PETITION FOR REHEARING

O. JOHN ROGGE
HERMANN ROGGE
777 Third Avenue
New York, New York 10017
(212) 421-6400

SIDNEY N. SOLOMON
3000 Marcus Avenue
Lake Success, New York 11040
(516) 437-6443

Attorneys for Petitioners-Appellants

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The appellants' petition for a rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure for the reasons presently to be stated.

I

A request that the decisions below be reversed and the deficiencies annulled includes a request for a remand.

The Court in affirming stated that neither party asked for a remand, in which event there would be an evidentiary hearing as to the value of the stock of Nassau Plastics and Wire Corp (Nassau Corp).

But the appellants in this case asked: **"The decisions below should be reversed and the deficiencies annulled."** The appellants in *Berenson* v. *Commissioner,* 507 F. 2d 262 (2d Cir. 1974), asked for precisely the same relief (brief, p. 34), and the Court had no difficulty in reversing in part and remanding in part for a hearing as to value. The cases are legion where appellants have asked for a reversal and the courts have instead remanded for further proceedings. We respectfully submit that in all fairness and as a matter of equal justice the Court do likewise in the instant case: affirm in part, but reverse in part and remand for an evidentiary hearing as to the value of the stock of Nassau Corp.

All the more so should this result follow because both the Court as well as the Commissioner treat the sale of stock of Nassau in the instant case as a bona fide sale. The Court writes: "In light of *Berenson* we feel constrained to find that the sale was bona fide under *Clay Brown* and the Commissioner on this appeal does not argue to the contrary." (Slip Opinion at 1405). If the sale was bona fide,

and we submit that it was, then let the appellants have the benefit of an evidentiary hearing as to the value of the stock of Nassau Corp. Surely this is but a little thing to ask.

The Court in one paragraph of its opinion, writes in part:

> * * * Here the taxpayers had the unique advantage of being able to show that Wilson, just 15 days before Cathedral received its assignment, was willing to pay the same price on practically identical terms. But not only was there no evidence of the Wilson-Kraut negotiations, the record is also barren of any proof that Wilson even exists or if it does, that it is a non-tax-exempt entity. The agreement assigning Wilson's contract of sale to Cathedral not only fails to provide any financial consideration for the assignment by Wilson but it is not even signed by any Wilson representative. (The original contract between Nassau and Wilson is signed by one Leon Lautin on the latter's behalf but no corporate title is indicated.) Judge Raum noted below: "In the absence of any explanatory evidence (which was peculiarly within the control of petitioners) and in view of the two contracts' all too convenient timing, it is strongly suggestive [sic] the initial Wilson contract was merely a bootstrap effort to bolster petitioners' contention as to Nassau's fair market value, and we consequently must discount its evidentiary value." 62 T.C. at 431. (Slip Opinion at 1407-08).

We respectfully submit that these comments are unfair and give an incorrect view of the facts. The Court is asking appellants' trial counsel to have the prescience of Judge Raum and the Court. He did not have it by any means. The trial in this case took place in November 1973. *Berenson* came down in November 1974, nearly a year later.

Maybe Judge Raum had the ability to anticipate the *Berenson* guidelines. The appellants' trial counsel did not.

Moreover, the Commissioner subpoenaed Leon Lautin (to whom the Court refers as "one Leon Lautin") for the trial of this case. Lautin was Wilson. Lautin was present at the trial. But the Commissioner did not put him on the stand. The appellants' trial counsel did not put him on the stand either. After all, in his view, this case dealt with the sale to Cathedral, not to Wilson. And we repeat, he did not have the prescience of either Judge Raum or this Court. But the Court should not penalize the appellants for that. We humbly beseech the Court that in all fairness and as a matter of equal justice the Court do what it did in *Berenson*, affirm in part, but reverse in part and remand this case specifically for an evidentiary hearing on the value of the stock of Nassau Corp.

Such an evidentiary hearing may result in a finding that is less than the Commissioner's value of $168,445.60. On the other hand, it may result in more. The Court itself observed that "the Commissioner's findings on valuation were far less specific than those presented in *Berenson*" (Slip Opinion at 1410). The Court, however, did not remand because it felt from a "casual reading" of the tax court's opinion, that the tax court would have come up with a valuation less than the Commissioner's figure of $168,445.60. But apportionment was not in Judge's Raum's mind. He was thinking in terms of the all or nothing result in *Berenson* in the tax court, a case which this Court reversed. Thus through a combination of errors the appellants did not have their full day in court. The appellants

are at least entitled to an evidentiary hearing on the point of valuation.

Judge Raum, and the Court, inferred that "the initial Wilson contract was merely a bootstrap effort to bolster petitioners' contention as to Nassau's fair market value." It would be just as easy to infer that Wilson had large losses which it hoped to carry forward and tax shelter the income to be earned during the first five years of the contract (Slip Opinion at 1407 n.6). Moreover, the record is not barren as to why Wilson changed its mind, for revenue agent Meyer Shapiro testified on cross-examination by the government that Wilson changed its mind because it was not sure that Wilson's losses would be good as a tax shelter for Nassau's income (J.A. 52). Indeed, it was Irving Lowey, a certified public accountant and a principal in Eugene O. Cob[illegible]'s Management Methods Inc., who worked out the transaction first with Wilson and then with Cathedral. To infer that the Wilson contract was merely a bootstrap effort because of the lack of more evidence about it, is to overlook the much more probable explanation that petitioners' trial counsel without the *Berenson* guidelines (yet nearly a year away) did not see the necessity of showing what a non-tax-exempt entity would pay.

One last observation—in *Berenson* and in this case the Court held:

> In sum, we conclude that the portion of the purchase price agreed to by Temple [the tax-exempt entity] and Taxpayers that is in excess of the price a non-exempt purchaser would have paid under identical terms is not part of the proceeds of a §1222(3) "sale," and is, therefore, taxable as ordinary income to the recipients. (Slip Opinion at 1405).

Yet in the last paragraph of its opinion in this case the Court says: "We fail to see any nexus between a non-exempt entity's tax bracket and the price a tax-exempt entity might be willing to pay." With all due deference we find as incomprehensible the Court's failure to see any nexus as the Court finds incomprehensivable our point that the amount of extra purchasing power a tax-exempt entity has is equal to the amount of the taxes it does not have to pay.

Conclusion

We humbly beseech a rehearing and earnestly request on the rehearing that in all fairness and as a matter of equal justice the Court, as in *Berenson,* while affirming in part, also reverse in part and remand for an evidentiary hearing as to the value of the stock of Nassau Corp, for otherwise the appellants will forever feel that they did not have their full day in court.

Respectfully submitted,

O. John Rogge
Hermann Rogge
777 Third Avenue
New York, New York 10017
(212) 421-6400

Sidney N. Solomon
3000 Marcus Avenue
Lake Success, New York 11040
(516) 437-6443

Attorneys for Petitioners-Appellants

Certification

I, O. JOHN ROGGE, one of the attorneys for the petitioners-appellants, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for the purpose of delay.

O. John Rogge

O. JOHN ROGGE

#4891

Affidavit of Service by Mail

In re:

Kraut v Commissioner of Internal Revenue

State of New York
County of New York, ss.:

Harry Minott,

being duly sworn, deposes and says, that he is over 18 years of age. That on JAN 13 1976, 197..., he served 2 copies of the within Brief in the above named matter on the following counsel by enclosing said two copies in a securely sealed postpaid wrapper addressed as follows:

Scott P. Crampton, Esq.
Assistant Attorney General
Tax Division
Department of Justice
Washington, D.C. 20530
(Attorney for Respondent-Appellee)

Meade Whitaker, Esq.
Chief Counsel
Internal Revenue Service
Washington, D.C. 20530
(Attorney for Respondent-Appellee)

and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

Harry Minott

Sworn to before me this 13th day of Jan. 1976

Jack A. Messina

JACK A. MESSINA
Notary Public, State of New York
No. 30-2673500
Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1977